FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY HELSTOSKI,
Respondent.

No. 78-546

HENRY HELSTOSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

HONORABLE H. CURTIS MEANOR,
Nominal Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR HENRY HELSTOSKI IN REPLY IN NO. 78-546 AND IN RESPONSE IN NO. 78-349

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Introduction

In the 200 years of our nation's history there have been only eight cases in which this Court has dealt with the delicate problems inherent in any application of the Speech or Debate Clause in the federal Constitution. Only two—*United States* v. *Johnson,* 383 U.S. 169 (1966), and *United States* v. *Brewster,* 408 U.S. 501 (1972)—have involved claims of corruption on the part of federal legislators. In its opinions in both cases, this Court approached the issues with care, sensitive to the need to protect legislators from "possible prosecution by an unfriendly executive and conviction by a hostile judiciary," *Johnson,* 383 U.S. at 179.

Johnson and *Brewster* articulated clear rules as to

a) whether a particular indictment may proceed to a prosecution in an Article III court; and assuming the indictment can proceed,

b) what evidentiary strictures must be imposed upon a trial in such a tribunal.

The Solicitor General's[1] 124-page brief in this case is a double-barrelled attack upon both those opinions. The brief constitutes an unvarnished attempt to have this Court adopt a hitherto-rejected interpretation of the Speech or Debate Clause which would inevitably set the judicial system upon a collision course with Congress.

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[1] In our main brief we refer to the petitioner in No. 78-349 and the respondent in No. 78-546 as "the government." In view of the subsequent filing of a brief *amici curiae,* it is evident that representatives of the executive and the legislative branches of the government are in conflict with respect to the issues in this case. Accordingly, we shall in this brief generally use terms such as "the prosecution," "the Solicitor General," or similar references which will more accurately describe our adversary.

What is remarkable is that this massive effort is attempted in the face of the prosecution's reassurance that it is virtually unnecessary: that "Bribery prosecutions of present or former Members of Congress are, fortunately, not commonplace occurrences" (Pet. No. 78-349, 10) and at a time when, as is carefully pointed out in the brief of *amici curiae* (pp. 16-27), Congress is undertaking a major and successful effort to expand and strengthen its own self-policing mechanism and thereby more fully implement the design of the Speech or Debate Clause.

It is also remarkable that the executive branch of the government is willing to confront Congress on this question when the matter at issue is the admissibility of evidence which the prosecution says is not indispensable to its case. Indeed, as to this, the Solicitor's brief suffers from a deep-rooted and internal contradiction which goes directly to the heart of its case. The contradiction appears in the Solicitor's assertion, on the one hand, that the proof of performance of legislative acts which it seeks to introduce at trial is not "required," "needed," or "necessitated" (Br. 51, 63, 96) and the Solicitor's willingness, on the other hand, to precipitate a major confrontation involving all three branches, to the end that this evidence be sanctioned in an indictment and admissible at trial.

Of course, the prosecution is in a quandary: If it argues that its prosecution of Helstoski *requires* the proof of legislative acts, it becomes immediately apparent that the prosecution violates the Speech or Debate Clause and involves the "questioning," in a prohibited forum, of matters which are immune from Article III judicial inquiry. The prosecution knows that if indeed these proofs are necessary, they are *ipso facto* inadmissible upon the main arguments the government makes. As the District Court said, "If the government for whatever reason cannot prove

its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone" (Pet. No. 78-349, 60a-61a).

The prosecution's tactic then is to claim that these proofs are unnecessary and for that reason it ought to be allowed to use them. In other words, the prosecution in effect says, "Admittedly, if we need the proof we can't have it; but as we really do not need it, we should be permitted to use it." This strange argument buttressed by a claim that the prosecution is unconcerned with the truth or falsity of its proof (Br. 63), hardly masks the deeper fact that, in this case, the proof of legislative acts is vitally necessary if the prosecution is to have any hope of winning a conviction—as indeed it was necessary in order to procure an indictment. That is why the prosecution delayed the trial of this case five days before its opening by taking an interlocutory appeal from the ruling of the District Court; that is why the Solicitor General filed his petition for certiorari to review the Court of Appeals' ratification of the holding of the District Court; that is why the trial of this case has been delayed, at this date, for more than two years.

If the prosecution is to rescue its proceeding against Mr. Helstoski, it can do so only by putting before a petit jury the following: a) a witness who claims to have paid Mr. Helstoski a sum of money and b) the legislative act which that witness claims Mr. Helstoski did in return for the money. Faced with Mr. Helstoski's denial of his involvement in such a scheme and the extreme vulnerability or ambiguity of the testimony of the perhaps two witnesses adverse to Mr. Helstoski, the government cannot rely upon the witnesses alone but must wave the "bloody shirt" of the actual legislative acts if it is to convince a jury. It is this which underlies the prosecution's readiness to

stage a constitutional confrontation with Congress over matters which it ostensibly "does not require." It is this which underlies the Solicitor's desire to reargue questions which have been raised before and settled by this Court twice within the past 13 years.

We proceed to a reply to the Solicitor's brief. After dealing first with his statement of the questions presented and his statement of the facts, we shall turn to the specific issues in the sequence that they appeared in our brief. We shall first deal with the issues in No. 78-546 and then with the issues in No. 78-349.

The Solicitor General's Statement of Questions Presented

The Solicitor General has restated the questions which Mr. Helstoski presented in *his* petition which the Court granted. The alteration is by no means minor; it in fact signals one of the major difficulties in the Solicitor's case.

Question I in No. 78-546, as set forth both in our brief (p. 1) and our petition, queried whether it was the District Court—or the Congress—which had the *jurisdiction* to try an offense which on its face charged the performance of specific and identified legislative acts.

The Solicitor General restates the question so as to eliminate any reference to the jurisdictional issue. This is consistent with his view, as expressed in Br. 112, n. 48, that the Speech or Debate Clause does not reflect a jurisdictional allocation of disciplinary functions but is a mere rule of evidence.[2] We had thought that since *Kilbourn* v.

[2] In our main brief (pp. 29-30) we refer to the interaction between the Speech or Debate Clause and the Punishment Clause (Article I, §5, Cl. 2) and show that both clauses, read *in pari materia*, clearly effect a jurisdictional allocation.

Thompson, 103 U.S. 168 (1880), the first case in which the Court addressed the Speech or Debate issue, the jurisdictional impact of the Speech or Debate Clause has been clear. See, 103 U.S. at 189-90. Indeed, the Court confirmed this in its most recent expression on the Speech or Debate Clause in which it explained that the Clause operates to prevent "judicial power [from being] brought to bear on members of Congress." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975).

Mr. Helstoski's position is by no means dependent upon an analysis of the Speech or Debate Clause as a limitation or grant of jurisdiction. We nevertheless believe that jurisdictional allocation is at the heart and core of the Speech or Debate Clause and from that vantage point some of the positions of the prosecution (*e.g.,* mandamus and waiver) are not even arguable.

The Solicitor General's Statement of Facts

We observe without further comment the following:

The prosecution does not dispute: a) that during all his appearances before the grand jury when he gave legislative materials, Mr. Helstoski had every reason to believe that the aide whom he had employed some six years previously was the target—not himself—and that from and after the United States Attorney's refusal to advise him whether he was the target, Mr. Helstoski raised the Speech or Debate issue and declined to give legislative materials; b) that the grand jury which indicted Mr. Helstoski was a different one from the eight grand juries before whom he had appeared, and the ninth—the indicting—grand jury never saw him and received legislative materials, not from Mr. Helstoski but from the United States Attorney.

We also note the following:

The prosecution's quotation at Br. 7 of a warning to Mr. Helstoski that he need not produce documents omits to mention that the warning was plainly in the context of the Fifth Amendment. The Speech or Debate Clause, as the Court of Appeals found, was not mentioned (Pet. No. 78-349, 6a).

At Br. 13, the government, under the heading "Further Proceedings," refers to a pretrial conference in the District Court on August 3, 1978. Those proceedings are not part of the record in this case. Nevertheless, since the Solicitor has plainly misstated what occurred there, we have lodged with the Clerk of the Court a transcript of those proceedings. The transcript simply does not support the government statement, as follows:

> "The court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts." (Br. 13-14)

On August 3, 1978, the District Court made clear that it understood the *Johnson* and *Brewster* cases to prohibit a showing at trial of legislative acts; that it would enforce such a rule but would decline to give advance ruling on 23 proffers of proof; that its ruling on each offer of proof would necessarily be determined by the context in which the proofs came in.

PART I

(The Issues in No. 78-546)

The jurisdiction of the District Court to try the indictment herein.

Any discussion of the issue as to the jurisdiction of the District Court to try this indictment[3] turns upon a careful analysis of the *Brewster* and *Johnson* cases, both of which specifically addressed the language of their indictments. The prosecution's discussion of the indictment issue in both cases is flawed.

A. The contrast between the *Brewster* and the *Helstoski* indictments.

The prosecution's insistence that the *Helstoski* indictment "is not materially distinguishable" from that in *Brewster* (Br. 93) reveals a failure to comprehend both the language of the *Brewster* indictment and the import of the *Brewster* opinion as a sequel to *Johnson*. *Johnson* had made clear that the bribed legislator may be tried in court where the bribery is for matters other than those referring to the legislative process. The Court, however, would simply not permit such a trial of a legislator to degenerate into a trial of the legislative process, which was inevitable if the prosecution was permitted to prove legislative acts. The predictable and necessary defense of the legislator would be that the legislation was justified

[3] The prosecution, sensitive to its implications, eschews jurisdictional language. Hence, it refers to this issue as involving the validity of the indictment. This portion of our brief responds to the Solicitor General's argument in Point II of his brief (Br. 88-106).

and the jury would then be called upon to pass upon the choice of motives of a legislator, exactly what is prohibited by the Speech or Debate Clause and our system of separation of powers. (See our fuller discussion of *Johnson, infra,* pp. 39-42.)

In *Brewster,* this Court permitted the judicial prosecution of a legislator "bought" by private interests and who acts as the tool of the briber on any matters concerning those interests.

The significance of this Court's ruling in *Brewster,* following so closely on *Johnson,* is that it sharpened the proposition that United States legislators may be tried in court for bribery, but that the legislative process itself, even when it is alleged to be corrupt, may not be tried. Thus, in *Brewster,* since it merely alleged that the legislator acted in behalf of the briber rather than the public interest in those of his official actions which concerned his private employer, it was unnecessary to inquire into any specific act the legislator undertook. It was enough to establish that on any matters generally affecting his employer, he agreed to act as the employer wished.

The mere fact that a Member may be tried for bribery in that case is not to say that a Member may be tried for bribery in conjunction with a specific and identified legislative act. What may be tried is the buying of a legislator but not the buying of a legislative act. The latter inquiry, as *Johnson* held, is inextricably bound up to the legislative process and thus is subject *solely* to the examination of Congress. A shorthand way of saying this may be that the judicial branch may try the buying of a legislator, but only Congress can try the buying of a bill. The corruption of the legislative process is a matter for Congress alone, though the corruption of a legislator can be the subject of judicial inquiry.

Such a formulation protects the independence of Congress and its undoubted power, indispensable to our tripartite democracy, to be the sole judge of its processes. At the same time, it permits judicial inquiries into the enticement or bribery of individual Members where such inquiries do not implicate the legislative process itself. This is the plain meaning of this Court's repeated assertions in *Brewster* that, in that prosecution,

> "[N]o inquiry into legislative acts or the motivation for legislative acts is necessary" (at 525)
>
> and
>
> "[I]nquiry into a legislative act or the motivation for a legislative act [is not] necessary to a prosecution under this statute (at 526)
>
> and
>
> "[A]n inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them' " (*ibid.*)
>
> and
>
> "Inquiry into the legislative performance itself is not necessary" (at 527)
>
> and
>
> "[A] member may be convicted if no showing of a legislative act is required" (at 528)
>
> and
>
> "[T]he Clause . . . does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not part of the legislative process itself" (*ibid.*).

In sum, this Court makes the point that where the bribery is such that it can be shown without reference to particular acts, where the corruption of the legislator may be proven without proving the corruption of the legislative process, the prosecution may proceed in an Article III court.

This is the import of the holding in *Brewster* that:

> "[T]he Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch . . ., but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." 408 U.S. at 524.

In this context a reading of the *Brewster* indictment shows that the Senator was not charged with having performed a specific legislative act or, for that matter, any legislative act. He was charged with taking money generally to represent a private corporation's interests in the Senate. The *Brewster* indictment charges him with accepting pay from a source other than the United States for being a Senator. In other words, the indictment in essence charged him with trying to function not only as the Senator from Maryland, but also as the Senator from Spiegel, on retainer to that company.

There was no difficulty in trying that case without an iota of proof of a legislative act. The crime was essentially taking money from private sources for performance of a public office and *that was in fact the case that was finally tried. United States* v. *Brewster,* 506 F. 2d 62 (D.C. Cir., 1974). The District Court, in the view of the majority of this Court, had jurisdiction to try that offense

because by its nature it did not require proof of any legislative act. Brewster was charged with being a corrupt legislator who had hired himself out *ex officio* to private interests. The *Brewster* indictment did not charge that any particular legislative action was corrupt.

That is not this case. The *Helstoski* indictment charges the taking of money to do specific legislative acts and that is what the prosecution seeks to try. While the prosecution may argue that 18 U.S.C. §201(c) does not *require* proof of legislative acts, the very reason it took an interlocutory appeal and pressed a petition before this Court was to prove such acts at the trial of the *Helstoski* indictment.

The prosecution is refusing to face the reality of the difference between the two indictments when it says:

> "The actual performance of those acts is not part of the offenses charged here, just as it was no part of the offenses charged in Brewster." (Br. 95)

The *Brewster* indictment could be tried—*as indeed it was*—with no proof of any legislative act because the *Brewster* indictment did not rest upon the doing of any legislative act. It rested upon Brewster's agreement to use his official position in whatever way the Spiegel Company wished in respect to any legislative matters that concerned the company. But the *Helstoski* indictment cannot be tried that way, if the court is to try the grand jury's indictment. The prosecution is indeed seeking to try the *Helstoski* indictment exactly as it presented it to the *indicting* (the ninth) grand jury, *i.e.*, with proof of the performance of legislative acts.

This Court could quite properly say in *Brewster*:

> "An examination of the *indictment* brought against appellee and the statutes on which it is founded

> reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the government to make out a *prima facie* case." 408 U.S. at 525 (emphasis supplied).

Thus, the Court was not limiting itself to the provisions of the statute; it was looking at the *Brewster* indictment as well.

In fact, the holding in *Brewster* clearly implies that an indictment which on its face makes charges which are offensive to the Speech or Debate Clause may not proceed to trial. The holding of *Brewster* rejects the idea that the Speech or Debate Clause is a mere evidentiary proscription at trial which need not be addressed at the indictment stage; if it did, this Court would not have bothered to examine the language of the indictment, for it could simply have said the Speech or Debate Clause would then be satisfied by an evidentiary proscription at trial. Instead, *Brewster* includes an extended and detailed review of the indictment to show that the indictment itself did not conflict with the Speech or Debate Clause.

In short, *Brewster* is a clear holding that the indictment in that case could proceed to trial precisely because it did not charge a legislative act. Since the *Helstoski* indictment clearly does so charge, *this* indictment cannot be tried and the interests which will thereby be protected are the institutional concerns of Congress.

B. Redacting the indictment.

The prosecution cavalierly suggests that if the Court disagrees with it in its reading of *Brewster*, it should simply approve the redaction of the indictment without any attention whatever to the impact of such a procedure upon the workings of the Speech or Debate Clause.

May the indictment be redacted? May its offending portions be removed? In *Johnson,* where the Court was faced with an allegation of a specific legislative act, it did in fact allow an excision and permitted a redacted indictment to go to trial. But *Johnson,* we shall show, is fundamentally different from *Helstoski.*

It may well be that in a normal criminal case of the type referred to at Br. 96-97, n. 38, or in *United States* v. *Dowdy,* 479 F. 2d 213 (4th Cir., 1973)—which did not charge performance of a legislative act but, like *Johnson,* involved the offer of proof of a legislative act in support of a charge of performance of a non-legislative act—a surgical excision can be performed and the indictment may proceed. Not so here, where the essence of the indictment is the series of allegations as to the performance of legislative acts. Though redaction could conceivably solve Fifth Amendment indictment problems where the changes are not considered too substantial (but *cf., Ex Parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960), discussed in our main brief, pp. 44-49), excision is not a remedy for an indictment which directly confronts the Speech or Debate Clause as does the *Helstoski* indictment.

In suggesting excision of the offending portions of the indictment, the Solicitor General ignores that the Speech or Debate Clause is designed to satisfy the institutional interests of Congress by preventing *accusations* of legislators in tribunals other than their own, where the basis of the accusation is their performance of a legislative act. That is the whole point of *Ex Parte Wason,* 4 Q.B. 573 (1869), discussed at length in the brief of *amici curiae,* pp. 40 *et seq.,* and ignored by the government. The design of the Speech or Debate Clause is to protect the legislature from pressure by the executive as

well as from pressure by the judiciary: It requires that the Clause be operative at the point where the executive moves, namely, the accusatory stage, the indictment. If the Speech or Debate Clause is not applied at the accusatory stage, then its institutional role in protecting legislators from pressure by the executive is effectively vitiated. Legislators (and Mr. Helstoski is the perfect example) know the devastating effect of an indictment on their political careers—long before the charges come to trial—and such interference with the prerogatives of the electorate is exactly what the Framers tried to prevent.

Were redactions of the indictment permitted here, a clear signal would be given to every United States Attorney that he is free to use his grand juries and their subpoena power to delve into the legislative process as he wishes. Using a grand jury, he is free to make any charge that he wishes with respect to alleged corruption, by way of alleged bribes or campaign contributions, in the introduction, evaluation, debate, or vote on any legislation in Congress. He may use the grand jury and the indictment process to a fare-thee-well, bringing the entire weight of the accusatory role of the federal government upon the hapless legislator, with no restriction upon the prosecution other than that, at trial, some of the grand jury's allegations may be struck. Whatever else that scenario describes, it is not one protecting the independence of the legislature.

The Solicitor's discussion of *Bain* and *Stirone* seems to miss the point. We are of course aware of the progeny of those cases in this Court and the Courts of Appeal, some of which are cited at Br. 96-97, n. 38. *Ford* v. *United States,* 273 U.S. 593, 602 (1927), dealt with an averment which was useless, hence innocuous. The Cir-

cuit Court decisions deal with such questions as whether a charge is being expanded or reduced, *United States* v. *Hall,* 536 F. 2d 313, 319 (10th Cir.), cert. den. 429 U.S. 919 (1976); or whether the change "affect[s] the charges brought by the grand jury in any substantial manner," *United States* v. *Crane,* 527 F. 2d 906, 912-13 (3rd Cir.), cert. den. 426 U.S. 906 (1976); whether the change is "merely a matter of form" or reflects simply the withdrawal of a charge that "the evidence does not support," or the elimination of defects "which are merely formal or technical, and which in no way prejudice defendant or alter the essential nature of the indictment," *United States* v. *Dawson,* 516 F. 2d 796, 800-802 (9th Cir.), cert. den. 423 U.S. 855 (1975); or where the language was plainly surplusage and where there is no substantial likelihood that the grand jury's indictment turned thereon, *United States* v. *Cirami,* 510 F. 2d 69, 72 (2nd Cir.), cert. den. 421 U. S. 964 (1975). None of these cases, however, deals with a change which affects *the jurisdiction of the grand jury or the court.*

In *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943), where the Court considered the availability of mandamus to correct a refusal to dismiss an indictment, it carefully noted such cases as might involve a "question of the jurisdiction of the district court," 319 U.S. at 26. Speaking of *Bain,* the Court said:

> "This is not a case like *Ex Parte Bain,* 121 U.S. 1, where the petitioner had been convicted on an indictment which, because it had been amended after it was returned by the grand jury, was thought to be 'no indictment of a grand jury.'" 319 U.S. at 26-27.

Since *Bain* was considered a case in which the jurisdiction of the district court was defeated by the amend-

ment, then surely the instant case is even more clearly one of jurisdiction.

Redacting the instant indictment to simulate the *Brewster* indictment not only ignores the fact of legislative acts being considered by the grand jury, of which more below, but in doing so purports to shift jurisdiction over the case from the House of Representatives to the District Court. The prosecution has no power to effect such jurisdictional shifts by its process of excision or redaction, not for any technical reason, not alone upon Fifth Amendment indictment considerations, but mainly because the specific objectives of the Speech or Debate Clause are frustrated by that process.

C. The grand jury's consideration of Helstoski's legislative acts.

The Solicitor General, as we noted above, at no point disputes our factual contention that at the time Mr. Helstoski appeared before the grand jury he believed his former aide was the target and that he offered no legislative materials after his request to be advised whether he was a target was refused. Neither does the Solicitor dispute that the ninth grand jury—the one which indicted Mr. Helstoski—never received any material directly from him. All the legislative material which it employed was given it by the U.S. Attorney.

The prosecution first argues that a grand jury proceeding is not "adversarial" and "arguably does not entail 'questioning' [the legislator] in violation of the Speech or Debate Clause" (Br. 98). We had thought that *Gravel* v. *United States,* 408 U.S. 606 (1972), settled the applicability of the Speech or Debate Clause to grand jury proceedings. If the legislator is the target, then, con

trary to the prosecution's statement at Br. 98, his legislative activity may not be considered by the grand jury, whether derived from the legislator himself or from any other source. In *Gravel,* it was Dr. Rodberg, not the Senator, who was the witness and the Senator merely intervened to protect his interest.[4]

On this issue this case would not be one whit different if all the bills had been presented to the grand jury from copies available in the Library of Congress and if correspondence had been obtained from the persons with whom Mr. Helstoski corresponded. It is legislative materials, however they may have been obtained, that the Speech or Debate Clause bars from consideration by the grand jury when it has set its sights on a legislator. It therefore misses the point of that Clause to say that "as long as the Congressman himself is not forced to submit to grand jury questioning, the grand jury may well be able to review evidence of legislative acts without offending the Speech or Debate Clause" (Br. 98). Such a view assumes that there is a right of grand juries to regulate the legislative process and hear testimony with respect thereto. This is precisely what the Clause prohibits, not because of the need to protect the legislator personally but because of the institutional interests of the House.

Neither does this mean that the grand jury may not consider or is not empowered to hear about legislative

[4] While in *Gravel* a Speech or Debate privilege was also recognized in respect to congressional aides, the underlying purpose of that extension was to recognize the right of the Senator. Moreover, the protective order framed by this Court "forbade questioning of *any* witness, including Rodberg" (emphasis supplied) with respect to legislative matters. 408 U.S. at 628. Additionally, in *Johnson* the proscribed evidence was not proved from the mouth of the legislator or even an aide. See *infra,* p. 43.

materials when a legislator is not the target or when legislative acts become relevant to civil litigation not involving a Member of Congress. The issue is not alone whether the legislator is the witness; the question is, what is the nature of the testimony and is the legislator the target? Is the grand jury setting itself up to question the motives of legislators or the legislative process? It is the answer to that question which establishes both the institutional interest of Congress and the right of the individual legislator.

Where the Constitution uses the word "question," it uses it in the context of accusing—charging—and not in the narrow sense of asking a question. That is certainly the import of the statement in *Kilbourn* v. *Thompson* equating the Speech or Debate Clause to the provisions of Colonial constitutions which prohibited "accusation or prosecution, action or complaint," 103 U.S. at 202.

Finally, reliance by the government on *United States* v. *Johnson,* 419 F. 2d 56 (4th Cir., 1969), is misplaced (Br. 102). In that case the sole question was whether an indictment should be dismissed on the ground that the grand jury heard evidence of legislative acts, where the only counts of the indictment which were tried made no charge of and in no way involved the performance of any legislative act.[5]

[5] It is not necessary for us to press in this case the argument that the grand jury's consideration of legislative materials voids an indictment for an offense which is wholly non-legislative in character. That is *Johnson II,* cited in the text. Without conceding that that case is correctly decided, it is clear that the case is entirely different when the product of the grand jury's consideration of these materials is clearly set forth in the indictment and the indictment plainly does charge legislative acts.

D. The *Costello-Calandra-Lawn-Blue* argument.

There is an air of insouciance about the argument from *Costello, Calandra,* and other cases (Br. 100 *et seq.*)[6] because the prosecution seems to forget that it is the Speech or Debate Clause at issue, rather than the general administration of the criminal justice system.

At Br. 99, n. 40, the Court is told:

> "If a Senator or Representative were free to challenge an indictment on the ground proposed by respondent, *virtually every indictment returned against a Member of Congress* would prompt a pretrial inquiry into whether the grand jury heard any evidence of legislative acts and, if it did, whether the amount of that evidence and its likely impact on the grand jury's deliberations were sufficient to warrant dismissal of the indictment. This is precisely the kind of pretrial proceeding that the Court's previous decisions have consistently sought to avoid." (Emphasis added.)

The Solicitor General continues with an expos ion of the general harm that may occur to the criminal process if defendants could inquire as to what went on in the grand jury room, for which he cites the *Costello* case.

How many indictments are there of Members of Congress for their legislative acts? We have been assured by the Solicitor General that they are very few (Br. 75). Does not the imperative of the Speech or Debate Clause, the need for preserving the structure of government, at

[6] *Costello -. United States,* 350 U.S. 359 (1956); *United States* v. *Calandra,* 414 U.S. 338 (1974); *United States* v. *Blue,* 384 U.S. 251 (1966); *Lawn* v. *United States,* 355 U.S. 339 (1958).

least entitle the legislator in the very few cases in which there *are* indictments to ask whether the grand jury itself breached the limitations of the Speech or Debate Clause? To set against this proposition principles applicable to the general administration of the criminal law seems absurd.

If the Speech or Debate Clause applies to grand juries, as *Gravel* settled, how is the legislator to obtain Speech or Debate relief unless he can attack the indictment which is the product of that violation of the Constitution? To be sure, he may proceed by injunctive relief, as did Senator Gravel and Congressman Eilberg, if he knows that the grand jury is proceeding against him. *In re Grand Jury Investigation,* 587 F. 2d 589 (3rd Cir., 1978). But the ninth grand jury, the one that targeted the Congressman in this case, proceeded with absolutely no knowledge on the part of Mr. Helstoski as to its undertaking. If Mr. Helstoski cannot question that grand jury's handiwork when it is plainly based on the Speech or Debate Clause, then grand juries, at least those that do not trumpet their activities, are effectively given free rein to proceed against legislators unhampered by the Speech or Debate Clause.

In our structure of government, the "checks and balances" which protect each branch are themselves to be protected from decay by the judicial branch and its ultimate oversight of the Constitution. Obviously, then, the question of whether the Speech or Debate Clause has been violated rests with this Court. The corollary of that grant of power is necessarily that the Court exercise its jurisdiction to make timely and appropriate determinations which effect the purpose of the Speech or Debate Clause.

Furthermore, there is a profound distinction between this case and those relied on by the Solicitor General. The

defendants in *Costello, Calandra, Blue,* and *Lawn* did not have a right to the setting aside of their indictments because the Court found that they had no right to object to the grand jury's consideration of the evidence in question. That conclusion was arrived at upon considerations as to the role of the grand jury in the general administration of justice. We do not believe this Court is prepared to say that the Speech or Debate Clause does not apply to grand jury proceedings and that the grand jury is entitled to set itself up to review of the legislative process—although *Johnson* and *Brewster* have prohibited this to the courts. In fact, *Gravel* clearly held that the Speech or Debate Clause does govern grand jury proceedings. Under those circumstances, the Court must apply the only remedy that is meaningful, namely, the setting aside of the product of this violation of the constitutional separation of powers.

Since the grand jury had no right to receive the evidence, the sole question is, what is the appropriate remedy where a clear proscription has been breached? The line of cases relating to a grand jury's use of immunized testimony, referred to in the brief of *amici,* pp. 37-39, and ignored in the Solicitor's brief, provides the clear answer. See, *e.g., United States* v. *Hinton,* 543 F. 2d 1002 (2nd Cir., 1977). These cases hold that an indictment obtained by a grand jury which had considered immunized testimony must be dismissed.

Significantly, this rule emerged from a statute barring the use of immunized testimony "against the witness in any criminal case," 18 U.S.C., §6002. This Court in *Kastigar* v. *United States,* 406 U.S. 441, 446 (1972), described this statute as providing "a sweeping proscription of any use, direct or indirect, of the compelled testimony." The court in *Hinton* had no difficulty in concluding that since the statute "prohibits . . . use [of immunized testimony

against a witness] not merely at trial, but in the grand jury proceedings as well," 543 F. 2d at 1009. And the remedy for breach of the statute is dismissal of the indictment.

Returning to the Speech or Debate Clause, this Court has already determined that the Clause retains its vitality in the grand jury room, *Gravel.* Certainly the language of the Constitution is at least as broad and all-inclusive in its prohibitory language as is the immunity statute. It would thus seem obvious that, whatever may be the case in respect to a grand jury's ignoring a rule of evidence (*Costello*) or a judge-created remedy for violation of Fourth Amendment rights (*Calandra*), or as relates to the workings of the Fifth Amendment (*Lawn* and *Blue*), and whatever the needs of the general administration of criminal justice, there must be an immediate remedy for a grand jury's violation of the fundamental principles of tripartite government enshrined in the Speech or Debate Clause.

E. The procedural argument: mandamus and timeliness.

We find it difficult to believe that the fundamental issues in this case could be determined by the procedural arguments presented by the Solicitor General at Br. 89.

Mandamus *is* the proper remedy here, first because the case involves the jurisdiction of the courts, recently restated by this Court as within the compass of the writ, *Will* v. *Calvert Fire Ins. Co.,* —— U.S. ——, 57 L. Ed. 2d 504 (1978). But even if that were not so, concern for the relationship between coordinate branches of the government dictates that trial, and appeal thereafter if there were to be a conviction, is not the proper way of determining fundamental constitutional questions.

In *United States* v. *Nixon*, 418 U.S. 683 (1974), this Court refused to require the President to go through the normal process of contempt and appeal after conviction as a procedure for testing the correctness of a court's ruling that he abide by a subpoena. Said the Court:

> "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-92.

And the Department of Justice has claimed that the Attorney General is entitled to the same deference as is the President and should not be put to the process of contempt in order to test the validity of a court order[7].

Even the claim of a foreign government was considered to be a case of "such public importance and exceptional character" as to cause this Court to invoke its own mandamus jurisdiction. Since the case involved the "dignity and rights of a friendly sovereign state," it was deemed inappropriate to delay determination by relegating the foreign government to the Court of Appeals. *Ex Parte Republic of Peru*, 318 U.S. 578, 586-87 (1943).

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[7] In its brief in the Court of Appeals for the Second Circuit in *In re The Attorney General of the United States, Petitioner-Appellant, Socialist Workers Party, et al., Plaintiffs-Appellees* v. *The Attorney General, et al., Defendants-Appellants*, No. 78-6114, the government argued that the Attorney General was entitled to the same "exception to the finality rule" as was the President of the United States to avoid "an unnecessary occasion for constitutional confrontation between two branches of the government." The government argued that "the Supreme Court's decision in *Nixon* provides an avenue for avoiding a protracted confrontation between two branches of government which is both unseemly and unnecessary.

The Congress of the United States is entitled to no less consideration than is the President, the Attorney General, or a foreign government. The Solicitor General makes the familiar argument that Mr. Helstoski can only have a review of the denial of the motion to dismiss if he is convicted and the Solicitor contends that this is required by the Court's frequently stated policy against interlocutory consideration of pretrial orders in criminal cases. That policy, designed to prevent interference with the "orderly progress" of a proceeding, *Cobbledick* v. *United States*, 309 U.S. 323, 329, n. 6 (1940), can hardly apply here.

The prosecution's arguments on this point plainly have no merit in light of what this Court has said as to Members of Congress being entitled to relief "from the burden of defending themselves," *Powell* v. *McCormack*, 395 U.S. 486, 505 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967), and to an "expeditious treatment" of a motion to dismiss, *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 551, n. 17.

The trial of this case has been postponed not by Mr. Helstoski but rather by the prosecution. The issue raised by the mandamus petition has in no way contributed to any delay in the prosecution of this case. While the Court of Appeals ultimately denied the petition for mandamus, it ordered the case briefed together with the government's appeal and decided them together. To address this case, then, in terms of a policy of not interfering with the normal course of a trial seems quite wide of the mark.

Finally, we believe that suggestions of untimeliness, and that petitioner should have predicted the outcome of *Abney* v. *United States*, 431 U.S. 651 (1977), and should earlier have filed an interlocutory appeal,[8] are quite mis-

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[8] The government carefully avoids conceding that *Abney* would have been applicable to this case (Br. 92), and a later decision, *United States* v. *MacDonald*, 435 U.S. 850 (1978), has emphasized that *Abney* has its limitations.

placed. What was filed was a petition for a writ of mandamus/prohibition and that was clearly justified. We know of no specific time limit upon such a proceeding and it was filed at a time when it in no way delayed the proceedings.

Perhaps counsel for Mr. Helstoski might have simultaneously filed an interlocutory appeal and a mandamus to avoid the responsibility of predicting the procedural form which might be effective in this uncertain area of appellate jurisdiction. Indeed, that is what Attorney General Bell did when faced with an order of contempt for refusing to abide by a district court order. As it developed, the Court of Appeals for the Second Circuit in its decision rendered on March 19, 1979, in the case referred to *supra,* n. 5, ruled that interolcutory appeal was improper. The court refused to apply the Nixon exception to the Attorney General for that purpose. It then held that mandamus, the remedy chosen by counsel for Mr. Helstoski in this case, was appropriate for the Attorney General's case. Significantly, a major consideration mentioned by the Second Circuit, in sustaining the appropriateness of mandamus, was the importance of the separation of powers.[9]

Counsel chose mandamus rather than interlocutory appeal because of his awareness of the particularly restric-

[9] "We cannot ignore the fact that a contempt citation imposed on the Attorney General in his official capacity has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant."

The above opinion was rendered two days before this brief went to press and counsel does not have a printed slip sheet opinion. The foregoing appears at p. 12 of the typewritten copy of the filed opinion.

tive view taken by this Court in respect to interlocutory appeals in criminal cases. In view of the important Speech or Debate aspects of the case, as well as its jurisdictional implications, mandamus appeared to be the more appropriate remedy.

Moreover, counsel pointed out to the Court of Appeals in the mandamus petition that the very reason for the sharp restriction of interlocutory appeals in normal criminal cases, namely, the avoidance of "piecemeal" appeals, *Cobbledick, supra,* 309 U.S. at 325, called for the issuance of the writ in this case. The prosecution had already filed an interlocutory appeal, it had already delayed the case, and the issue it was presenting to the Court of Appeals involved the evidentiary implications of the Speech or Debate Clause. Thus, *not* to grant the petition, so that the court could at the same time consider the indictment or jurisdictional implications of the Speech or Debate Clause would have amounted to a judicial insistence on piecemeal appeals despite the fact that the issues "for practical purposes [presented] a single controversy," *ibid.*,[10] a consideration which, aside from separation of powers concerns, should have prompted the lower court to determine this matter on the petition for writ of mandamus. We are not necessarily arguing that every time a Member of Congress is prosecuted he is entitled to an interlocutory appeal or mandamus if he raises substantial and non-frivolous defense issues, even though that might well be an appropriate

[10] We are not suggesting that the fact that the prosecution filed an interlocutory appeal opened the door to any and all appellate issues in this case. The mandamus petition was specifically limited to Speech or Debate issues and did not include other appellate issues which were in fact ripe for review, *e.g.,* Mr. Helstoski's motion to dismiss the indictment because of the use of multiple grand juries (see opinion of Judge Meanor denying that motion, Pet. No. 78-546, 9a).

rule. We do, however, say that where the prosecution has taken an interlocutory appeal which seeks review of Speech or Debate issues, then the refusal to accept mandamus to consider related Speech or Debate issues amounts to that "leaden-footed" administration of justice previously criticized by *this* Court, *Cobbledick, ibid.*

Whatever the form of the requested relief—interlocutory appeal or mandamus—the question for the Circuit Court was whether it would exercise its powers to prevent both a serious attack upon the separation of powers and a piecemeal approach to the appellate issues, which were but two facets of the same underlying constitutional question. The prosecution's argument on these issues and the refusal of the Circuit Court to deal with the issues in the mandamus petition simply cannot be squared with this Court's assurance of an "expeditious treatment" of a motion to dismiss in a case which presents serious Speech or Debate confrontations, *Eastland, supra,* 421 U.S. at 551, n. 17.

PART II

The Evidentiary Issues

(Introduction)

Johnson holds that in a criminal prosecution of a Member of Congress his legislative acts may not be used as evidence against him even though the prosecution is for the performance of a non-legislative act. *Johnson* explicitly rejected the contention there presented by the government that the Speech or Debate Cluase protected only against prosecution for the doing or content of a legislative act itself. And just as explicitly, the Johnson ruling was reaffirmed by *Brewster*:

> "Our holding in *Johnson* precludes any showing of how he acted, voted, or decided." 408 U.S. at 527.

Despite the foregoing, the government presents two theories under which it should be permitted to prove legislative acts in this case:

a) Where a Congressman is charged with conduct not encompassed within the Speech or Debate Clause, the government should be permitted to prove his legislative acts in support of that charge, provided it does so by proof of acts and statements "that are not part of the legislative process even if one or more of them refers to a past legislative act" (Br. 28). In other words, so the Solicitor General argues, the legislative process and legislative acts may be implicated in the trial because the Speech or Debate Clause addresses only the form of proof of legislative acts, not the substance.

b) §201 is a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the con-

duct of its Members (Br. 28) and under that statute Congress has effectively delegated to the courts its power to discipline its Members.

We shall deal with the second argument later in this brief; at this point we focus on the first contention. But before we deal with that contention in detail, we believe it appropriate to set forth exactly what the government is driving at as applied to this case.

The government analyzes the evidence of legislative acts into three categories:

a) The immigration bills themselves (Br. 43);

b) Correspondence between Mr. Helstoski and others which would show that bills were introduced and how they progressed in the House, particularly the Immigration Subcommittee of the House Judiciary Committee, including requests for supporting information to establish the hardship necessary for favorable action on the bills (Br. 44);

c) Testimony by persons for whom bills were introduced which would effectively show that bills were in fact introduced on their behalf (*ibid.*).

The prosecution seems to concede that, absent waiver, the immigration bills are inadmissible (Br. 64). Again, absent waiver, it acknowledges the inadmissibility of grand jury testimony by Mr. Helstoski describing his introduction of such bills (Br. 65, n. 26). The prosecution also concedes that such correspondence as entailed the Congressman's seeking information to support a bill might also be barred. By reasoning that is hardly clear, the prosecution argues that other evidence which proves the introduction of bills, such as conversations and letters, is admissible. The only statement by the government as to a distinction among these forms of evidence is that it

> ". . . wishes to use the letters not to show the occurrence of any legislative acts, but to show respondent's role in a scheme to introduce private bills in return for payment." (Br. 66)

Aside from the fact that this argument, in similar form[11] was made and rejected in *Johnson*, it should be recognized that the government apparently concedes that it may not prove legislative acts from official sources but may do so if it finds an indirect or unofficial form of proof. The decision of the District Court and the Court of Appeals was that legislative acts could not be proved and that, as stated by the Court of Appeals:

> "To allow a showing [of past legislative acts] by such secondary evidence would render *Brewster's* absolute prohibition meaningless." (Pet. No. 78-349, 28a.)

It is the Solicitor General's position that the testimony of his witnesses as to Mr. Helstoski's statements regarding the introduction of legislation "would not be offered for the purpose of showing the performance of a legislative act" but rather would "tend to show the existence of the illegal bribery scheme charged in the indictment, whether or not any legislative acts were in fact performed" (Br. 63). In short, he repeats the argument, rejected below,

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[11] Said the Department of Justice in its brief in *Johnson*, submitted to this Court (p. 6):

> "While this purpose requires the immunization of legislators from liability founded upon the content of their official speech, it does not justify immunity from prosecution for the antecedent unlawful act of taking a bribe to make a speech in Congress—an act which is an offense whether or not the speech is ever given."

that legislative acts are probative, not of themselves, but of "knowledge and intent," *ibid.*, and may be offered for that purpose without the act itself being proved and thus put at issue. It is an argument of so little weight, however, that the Solicitor himself provides the reply, only pages before:

> "While the statement 'I will introduce your bill tomorrow' may be somewhat less probative of the fact of introduction of the bill than the statement 'I introduced your bill yesterday,' both statements tend to prove the performance of a legislative act." (Br. 60)

And earlier:

> "While the first kind of evidence may be slightly more probative of the actual performance of a legislative act than the second, both circumstantially indicate to the jury that the acts mentioned have occurred . . ." (Br. 18)

Clearly, the prosecution knows that what it is trying to do, in introducing evidence of the performance of legislative acts, is to prove those acts. The devious argument that a jury can be told the acts are introduced to show knowledge or intent, motivation, or any of a number of things, cannot hide the fact that it is the acts which are being proved and in such fashion as to amount directly to an "inquiry into the legislative performance itself" (*Brewster,* 408 U.S. at 527), which this Court has forbidden.

I. The Solicitor General is effectively seeking to have this Court overrule *Johnson* and *Brewster.*

A. The prosecution's erroneous reading of Johnson (Br. 45-52).

In support of its argument that the categories of evidence it seeks to introduce (whether to prove legislative acts or to prove "intent or knowledge") are admissible, the prosecution develops an argument that it is the form in which those acts are proved that is controlling. But *Johnson* and *Brewster* establish that in a prosecution of a legislator for criminal conduct, his legislative acts may not be used as evidence against him and those cases, as we shall show, equally establish that *the form of the proof of legislative acts is irrelevant.*

The surprising feature of the government's argument on this score is that in its efforts to avoid the clear holdings of this Court, it repeats at this time, almost in the same words, some of the arguments it made in *Johnson* which were explicitly rejected by the Court.

The heading of the prosecution's Point A(1) (Br. 29) reads as follows:

> "1. The history of the Speech or Debate Clause indicates that the Clause is not concerned with evidentiary references to past legislative acts, but rather is designed to preclude inquiry by the executive and judicial branches into the substance of legislative activity."

Underlying the argument that the form of proof of legislative acts is important is the government's reversion to its *Johnson* argument that the Speech or Debate Clause was concerned only with prosecutions for the content of a legislative act. If it could only establish that, then its

next argument would flow more easily: namely, that the *Johnson* and *Brewster* holdings are technical evidentiary rulings easily overcome by changing the manner in which legislative acts are proved. Therefore, the government repeats in slightly different words the argument made by it and rejected by the Court in Johnson.[12] Throughout the *Johnson* brief the government argued that the Speech or Debate Clause functions merely to protect legislators from liability founded upon "the content of their official speech" (pp. 8, 9, 10). The government acknowledged that Johnson's speech had itself been proved but insisted that it had offered no testimony concerning the "content or the giving of the speech" (p. 16). During oral argument, counsel for the government emphasized that the content of the speech was not relied on by the government.[12a]

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[12] Points I(A) and (B) of the government's brief in *Johnson* are entitled:

> "A. The rationale of the speech or debate clause bars liability founded on the content of a legislative speech but does not bar liability based on an antecedent corrupt agreement.
> B. The English background sustains the view that the privilege of free speech and debate was designed to protect the content of speech, not the antecedent act of accepting a bribe."

[12a] See transcript of the government's oral presentation in *Johnson*, to be lodged with the Clerk of the Court.

Johnson was argued before the practice was adopted of routinely transcribing all oral arguments. The only record of that argument is a tape recording in the National Archives. Because counsel concluded, after listening to that tape recording, that some statements appearing theren were of special importance to the instant case, he is causing the tape recording to be transcribed and it will be lodged with the Clerk. By reason of the press of time the transcription has not as of the filing of this brief been completed. When it is lodged with the Clerk it will be accompanied with a Memorandum identifying the pages in the transcript which sustain the references to it in this brief.

This Court described the argument and its reaction to it as follows:

> "The Government argues that the Clause was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.'" 382 U.S. at 182.

The Court specifically rejected that argument, pointing out that historically, even in England, it was not so limited "and the language of the Constitution is framed in the broadest terms," *id.* at 182-83. It held that the Clause barred proof of a speech having been made on the floor of Congress in support of a charge of defrauding the government, even though the content of the speech did not figure in the prosecution. The Court made clear that its decision prohibiting proof of legislative acts did not prohibit a prosecution which "does not draw in question the legislative acts of [a] member of Congress or his motives for performing them," *id.* at 185. But proof of the legislative acts which, as the Court explained, necessarily opened up such questions as "who first decided that a speech was desirable, who prepared it, and what [the] motives were for making it" presented inquiry which "necessarily contravenes the Speech or Debate Clause." *Id.* at 184-85.

It is remarkable that, with minor variations, the government repeats in its current brief much the same arguments as were developed in *Johnson,* all in support of a theory that this Court has already rejected, namely, that the Speech or Debate Clause protects only prosecutions directed at the content of the speech.

Having reargued the "content of speech" point, the government then moves to what it considers to be its main

contention, that since U.S. legislators are subject to prosecution for soliciting or receiving bribes, the Court should not "impose evidentiary restrictions" that in the government's view obstruct the prosecutorial process and "do little to further the constitutional goal of legislative independence" (Br. 42). Obviously, if the government could convince the Court to depart from its holding in *Johnson* that the Speech or Debate Clause is not limited to prosecution for the content of the speech, it would stand a better chance of persuading the Court that the evidentiary proscriptions of *Johnson* are but minor technical limitations easily circumvented and sacrificed to the government's claim of prosecutorial need.

There follows a discussion of the *Johnson* case (Br. 45-52) which plainly misstates the holding of that case. The misstatement is evident in two independent but significant areas:

a) The government says: "The Court in *Johnson* disapproved a criminal charge that could *only* be substantiated through detailed questioning about a particular legislative act" (Br. 50, emphasis supplied) and the government then seeks to distinguish *Johnson* because in this case, so it argues, "proof of a legislative act and the motivation therefor" is not necessary to establish the offense (Br. 51).

Nothing could be a more distorted reading of *Johnson* as it applies to the instant case. Plainly, the *Johnson* prosecution did not *require* proof of legislative acts. The gravamen of that prosecution was Johnson's intervention with the executive branch on behalf of those who bribed him. When the Court remanded that case for retrial "purged of elements offensive to the Speech or Debate Clause," 383 U.S. at 185, the retrial could proceed, because in the original trial the government had introduced proof

of legislative acts in a prosecution which did not require such proof.

Accordingly, were the government's statement true that "Proof of the bribery charges against respondent [in this case] does not require evidence that respondent introduced a private immigration bill or performed any other legislative act," it would describe a situation in no way different from that in *Johnson,* where such proofs were not allowed. In fact, the indictment in this case, even if not the statute upon which it is based, does require proof of the legislative acts if the trial is to be of the indictment which was returned. See discussion in our main brief (pp. 41-42).

It is clear that the *Johnson* Court was not concerned with what was *required* to be proved to convict Johnson. The entire thrust of that opinion is directed at what was *in fact* proved and the manner in which such proofs put the legislative process on trial.

b) In its second misstatement, the prosecution says (Br. 51):

> "The concern of the Court in *Johnson* . . . was with accusations and trials that call legislators to account for what they have done in Congress . . . Johnson found fault not with a simple showing that a Congressman gave a speech, but with the government's attempt to impose criminal liability on the basis of that act and to question the Congressman and others about the act's background and motivation."

It is not possible to read the government's brief in *Johnson,* or the transcript of the oral argument before this Court in that case, or the Court's opinion per Mr. Justice Harlan, and still describe the *Johnson* case in the foregoing terms. As we pointed out above (pp. 34-35),

the government in arguing *Johnson* repeatedly and persistently contended that Johnson was being prosecuted not for what he said but for taking money. It was the Court, moreover, which pointed out that if in the course of such a prosecution the government actually proved his legislative conduct then the trial actually became a review of the legislative process and of legislative motivation, regardless of what the government claimed it was doing.

The ruling in *Johnson* flowed inevitably from the essential differences between the Speech or Debate Clause in our country and in England. In England, where the Clause provides a personal privilege, the *Johnson* issue could not arise because the courts there simply have no power to prosecute a legislator for any misdeeds. Parliament retained the sole right to prosecute a legislator whether he was charged with legislative or non-legislative conduct. But in this country, the Clause from the beginning has applied only to legislative conduct. That is why an issue could arise as to the permissbility of proof of legislative acts where the prosecution was for non-legislative acts—and that was the *Johnson* case.

When it rejected the government's argument in *Johnson* that the Speech or Debate Clause applied only to prosecutions for the content of speech, this Court did so in the context of its recitation of the purposes of that constitutional provision. It emphasized the specific functions of the Speech or Debate Clause as protecting "the independence and integrity of the legislature" and reinforcing "the separation of powers." 383 U.S. at 198. The opinion significantly quotes from *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), approving its reference to Chief Justice Marshall's opinion in *Fletcher* v. *Peck,* 6 Cranch 87 (1808):

> "It is not consonant with our scheme of government for a court to inquire into the motives of legislators."

Analyzing the evidence of legislative acts in *Johnson,* Mr. Justice Harlan pointed out:

> "It was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it." 383 U.S. at 184.

Earlier, Mr. Justice Harlan had stated:

> "Johnson's defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution's case he introduced speeches of several other Congressmen speaking to the same general subject, argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D.C., newspaper, and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents." 383 U.S. at 177.

The particular vice of proving legislative acts in a prosecution of a legislator is that such proof inevitably requires an inquiry into the motives of the legislator. If the government proves the receipt of money and the performance of a legislative act and seeks to connect the two, then the defense must necessarily seek to establish, just as Johnson did, that the legislative act was sound and was motivated by considerations other than the alleged bribe—considerations which may involve the Congressman's personal perceptions of social policy or the desires of constituents who may have political clout, recognition of which is certainly not corrupt. In other words, the only defense to a charge that a certain act was corruptly motivated is to show a

non-corrupt motivation—to explain, for example, the need for the introduction of a certain bill, the agreement of other legislators that the bill ought to be introduced, constituent desire for such a bill, etc.; in short, all those matters which should be explained to the electorate and not the courts.

After reviewing the record of the *Johnson* case and pointing out that it took exactly the foregoing course, Mr. Justice Harlan says:

> "We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it." 383 U.S. at 177.

And such a judicial inquiry under a Section 201 prosecution would have precisely the same effect.

If the government in a trial of the *Helstoski* case proves his legislative acts, Mr. Helstoski—like Johnson—will have no choice but to prove that he and many other Members of Congress have introduced similar legislation. He will have to show that each bill which he is charged with having introduced was justified and properly motivated. He will prove the processes of the House Judiciary Committee in reviewing all private immigration legislation which is introduced.[13] He will prove, as outlined in the *amicus*

[13] In the course of this, he will undoubtedly correct the misleading and exaggerated misstatements of the impact of the introduction of a private immigration bill which appear in the footnote to p. 43 of the prosecution's brief.

(Footnote continued on following page)

brief submitted by the Speaker (pp. 51-57), the special and unique significance of private legislation as providing legitimate justification for the particular bills he introduced.

In short, the legislative process in respect to the bills at issue would inevitably be put on trial and, in the end, a jury would have to decide whether the defendant's account of his motives for introducing a bill were convincing, whether the bill in fact ought to have been introduced, or whether the bill was introduced with corrupt motivation. The jury thus would find itself square in the middle of the legislative process, deciding which bills were properly introduced and which were not. Such a prospect is precisely what has been understood, since the days of Chief Justice Marshall, to be impermissible.

Thus, the *Helstoski* case, if pursued as the prosecution would like, would inevitably present the kind of "intrusive judicial inquiry" into legislative proceedings and the motives therefor which Mr. Justice Harlan said "violates the express language of the Constitution and the policies which underlie it," 383 U.S. at 177.

An incisive question by Mr. Justice Harlan in the course of oral argument in the *Johnson* case makes clear that undertaking to prove the legislative process and to question the reasons for particular legislative conduct inevi-

(Footnote continued from preceding page)

For a more correct exposition, see 2 *Immigration Law and Procedure*, Gorden & Rosenfield, §7.12 (Matthew Bender, 1978, Rev. ed.). This text has frequently been cited by this Court, *Reid* v. *Immigration & Naturalization Service*, 420 U.S. 619, 622, n. 2 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65, 71, n. 12 (1974); *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 278, n. 2 (1966).

tably puts the Court in the position of impugning the legislative process. Counsel for the government was arguing that the government was prosecuting the receipt of a bribe, not the performance of a legislative act. But Mr. Justice Harlan interjected:

> "How can you impugn a speech more than by saying it is the result of a bribe?" (Transcript of oral argument lodged with the Clerk, *supra,* note 12a.)

There is no way of permitting legislative acts for whatever purpose—restricted or general to be introduced—in the trial of a legislator, for taking a bribe for having performed a legislative act, without inquiring into the motives of the legislator. There is no way of putting in issue the motives of the legislator without anticipating that he will respond by putting in evidence his own and his colleagues' legislative activities to show they were not corruptly motivated. In short, there is no way of presenting proof of legislative acts in the trial of a legislator without putting the courts in the position of questioning and impugning the entire legislative process—exactly what our courts have refused to do since *Fletcher* v. *Peck, supra.*

So viewed, it is plain that it is wholly irrelevant how legislative acts are proved—whether by copies of the *Congressional Record* or by correspondence or by conversations. It is equally irrelevant that the prosecution says it is seeking to prove one thing rather than the other. *Johnson* was not a technical evidentiary determination; the *Johnson* evidentiary determination dealt with the most fundamental aspects of separation of powers and the allocation of functions between the legislative and the judiciary. In whatever manner the legislative act is proved, the legislator is immediately challenged to prove that his legislative conduct was not corruptly motivated. This

necessarily places before a court and jury questions which are not for them to decide.

Questions as to the form of proof actually came up in *Johnson* and the Court decided that the controlling factor must be the fact of proof and not the form by which legislative acts were proven.

It will be recalled that the legislative act—the speech—in the *Johnson* case was proved, in part at least, by a reprint of the speech. Government counsel in the course of oral argument emphasized that, as distributed, the speech was different from that which was given because the title of the speech had been changed.[14] Beyond that, government counsel conceded that the record included testimony by an individual who stated that Congressman Johnson told him he had made a speech on the floor—*exactly the kind of testimony the government seeks to introduce here.*[15]

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[14] One Justice (unidentified in the tape recording) pinpointed this. After counsel for the government emphasized that "The caption on the speech was not the caption on the speech as it is recorded in the *Congressional Record,*" the following colloquy enusued:

> A Justice: "Are you drawing a distinction that if you used a copy of the speech delivered to the clerk and printed in the *Congressional Record* that that might have offended the constitutional protection? Is that what you are saying?"
>
> Government Counsel: "Im saying it tends to prove—I think it is a fact that we didn't rely on the speech as given." (*Johnson* oral argument, transcript to be lodged with the Clerk.)

[15] "There is in the record evidence that a reporter from the *Washington Post* talked to respondent in December of '61, which was before the indictment was given, and asked him both about representations before the Department of Justice and the representations and the speech and the government affirmatively did put on that reporter who said that respondent told him in 1961 that he made the speech because a constituent asked him to." (*Johnson,* oral argument, transcript to be lodged with the Clerk).

A brief comment by this Court at fn. 14 of its opinion in *Johnson* effectively disposes of the argument that the form of the proof of the legislative act mattered:

> "The use of a copy of the speech in this context necessarily required the jury to read those portions and to reflect upon its substance." 383 U.S. at 184.

It is thus clear that the evidentiary principles laid down by *Johnson* are wholly unaffected by the form of proofs of legislative acts and that in *Johnson* the Court had before it, and rejected, precisely the argument that the prosecution here presents again, namely, that the legislative acts are admissible if they are proved by evidence which did not itself constitute a legislative act, *e.g.,* a speech reprint or an oral conversation by the Congressman.

B. The Solicitor General's criticism of *Brewster*.

Brewster of course reinforced and reiterated *Johnson.* As this Court said:

> "[O]ur holding in *Johnson* precludes *any* showing of how he acted, voted, or decided.
>
> • • •
>
> "These [legislative acts' we *all* agree are protected acts that cannot be shown." 408 U.S. at 527-28 (emphasis added).

There is no question but that the District and Circuit Courts adhered strictly to the teachings of *Brewster.* The Solicitor General does not deny that the lower courts followed *Brewster;* but the Solicitor General thinks the *Brewster* decision is illogical, that this Court did not really mean what it said in that case. Thus, the primary thrust of the Solicitor's argument is that the Court should

depart from its *Brewster* opinion. A secondary thrust of the Solicitor's argument in relation to *Brewster* posits hypothetical assumptions as to what the evidence in this case may become—assumptions which are strenuously disputed by Mr. Helstoski—and he plainly misstates what the District Court said about those assumptions.

C. The argument that the *Brewster* decision is illogical.

Brewster, as we explained above (*supra,* p. 9) involved a claim that a Senator had received money upon a general promise to serve the briber in respect to legislative activities. While reaffirming *Johnson,* the Court held that the *Brewster* prosecution could proceed with the government barred from proving that Brewster had performed a legislative act. The government could prove that Brewster had taken money; it could prove that he had made a promise generally to perform legislative acts; it simply could not prove that legislative acts had been performed. So to do would bring the case back to precisely the situation in Johnson. It would force Senator Brewster to defend himself by proving the legitimacy of his legislative activities, and thereby put the legislative process on trial before the court.

Thus, the Court says:

> "To make a *prima facie* case under this indictment, the government need not show any act of [Brewster] subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act." (408 U.S. at 576 (emphasis in original).

This distinction between the promise to perform legislative acts and the actual performance of such acts is the

very essence of *Brewster*. It meant that *Johnson's* strictures against trying the legislative process within the courts would be fully enforced, while corrupt agreements which could be established without proof of legislative acts could be prosecuted.[16]

The Solicitor claims some ambiguity in the Court's holding that "*Johnson* precludes any showing of how [Brewster] acted, voted, or decided," 408 U.S. at 527 (Br. 55) and that those words may be interpreted to mean that evidence of the performance of legislative acts is in fact admissible. The Solicitor argues that "The contrary rule, advocated by respondent and adopted by the courts below, would produce absurd results" (Br. 56). Continuing the Solicitor says, "The district court and Court of Appeals . . . have injected a peculiar temporal element into the set of considerations relevant to the admissibility of evidence under the Speech or Debate Clause" (Br. 60). And finally he says, "The source of this past-future distinction is unclear (*ibid.*) and, in his view, has "logical flaws" (Br. 61).

The "past-future distinction" is of course precisely delineated in *Brewster* and this Court rendered a decision that could hardly be termed illogical. Far from being illogical or absurd, *Brewster* is a carefully drawn decision

[16] The Solicitor General's brief (Br. 54-55) completely misses the issue when it suggests that the Court in *Brewster* was recognizing a difference between the kinds of proof "necessary to sustain the indictment in *Johnson*, on the one hand, and *Brewster*, on the other." *Johnson* never dealt with what evidence was necessary to sustain the *Johnson* indictment. The Court there decided that particular evidence that had actually been admitted at the trial should not have been allowed. In *Brewster*, in a decision pretrial, the Court decided that the kind of evidence that had been proved in *Johnson*—legislative acts—could not be proved in *Brewster* either, but that such proof was not necessary for that indictment.

which distinguishes the promise to perform as a general agent in the Congress for a consideration—a set of circumstances which does not require proof of legislative acts —from the actual performance of such acts, recognizing that proof of the latter inevitably puts the legislative process on trial.[17]

To be sure, the Court's decision in *Brewster* evoked vigorous dissent from three of its members who argued for a far more stringent application of the Speech or Debate Clause, one that would have barred proof of a promise to perform legislative acts even in general terms *in futuro*. But no member of the Court—we repeat, not a single member of the Court—supported casting aside *Johnson* by permitting proof of the past performance of legislative acts as evidence against a Member of Congress. While the government may take a cavalier attitude toward trying the legislative process in federal courts, we doubt

[17] The Solicitor general assumes that *Brewster* draws the line between a promise to perform a specific act in the future and the performance of such act in the past. Even if *Brewster* is read that way the decision below must be affirmed, for the District Court merely prohibited proof of the past performance of a legislative act.

We believe that the relevant evidentiary distinction to be drawn from *Brewster* may not be the distinction between corrupt acts done in the past and those that may be done in the future, but rather between the promise to act as a general agent as opposed to the legislative act itself whether in the past or the future. While the *Brewster* indictment said that the Senator had promised to and had performed acts in general, those acts were never specified. Hence that case could be tried on the theory that the Senator was a general agent, not that he had performed or promised to perform any specific act. While some language in the courts *Brewster* opinion suggests that the court would also include within Section 201 promise to perform a specific bill (408 U.S. at 526-527) that certainly was not the holding of the case and was not involved in the indictment.

that this Court is prepared to depart from Mr. Justice Harlan's analysis in the *Johnson* opinion and allow federal courts and juries to become mired in the quicksand of determining the reasons for introducing a particular piece of legislation, or the motives of a legislator in calling for committee hearings. For it is that which is the inexorable consequence of proving legislative acts before a jury, and as our analysis of *Johnson* shows, it would not matter whether those legislative acts are proved by certified copies of the *Congressional Record* or by proof of an oral conversation that establishes the performance of a legislative act.

The government's quarrel with *Brewster's* temporal distinction is not with the District Court or the Court of Appeals, but with this Court.

That the *Brewster* decision did not prohibit the prosecution of legislators for the taking of bribes is no more clearly established than by the subsequent history of that case. The Senator was in fact prosecuted and convicted and it is clear that the proofs in that case did not involve any evidence of the performance of legislative acts. See *United States* v. *Brewster,* 506 F. 2d 62 (D.C. Cir. 1974). In that prosecution the proofs of the taking of money and the promise to perform legislative acts in general were strong enough that they could go to the jury without having to be corroborated by proof of legislative acts. Thus, the *Brewster* trial proceeded without putting the legislative process to trial.

The government's real problem here is that the *Helstoski* case, in contrast with *Brewster,* is based upon entirely uncorroborated testimony of two persons who claim to have made payments of cash for legislative acts. The truth of the matter is that here the prosecution's case is so thin,

so lacking in either direct or circumstantial evidence, and so utterly dependent on the unsupported testimony of two persons who are demonstrably untrustworthy, that it wishes to make its case more plausible and its witnesses more credible by introducing massive amounts of correspondence showing that Mr. Helstoski engaged in the legislative activity which it claims was purchased. It seems to be the prosecution's theory that if it can show the legislative acts took place, it will have less trouble convincing a jury that the acts were paid for. This may well be true; it is, however, no justification for allowing the prosecution to proceed in this manner. The trial would, on the prosecution's scenario, become a review before a jury of what took place, in committee and on the floor of the House—exactly what the Speech or Debate Clause was designed to prevent. That is too dear a price to pay to purchase credibility for those whom the prosecution has caught engaging in criminal activity.

If the alleged corruption of a Member of Congress can be proved only by reference to his performance of legislative duties, then that case of corruption is a matter for the Congress of the United States, for in such a case what is being tried is not the corruption of a legislator but the corruption of the legislative process. In the *Brewster* case, it was clear, and relatively easy to prove, that Brewster had been put on the payroll of the Spiegel Company to use his influence in respect to whatever might come before him, in the course of his Senatorial duties, regarding postal rate legislation. The corrupt Member of Congress could be, and was, tried without reference to any *particular* legislative act he performed on account of the yearly retainer he received from Spiegel. That was clearly a case the executive could try. But in this case the prosecution is claiming, that on several occasions he

undertook specific and identified legislative acts in return for certain amounts of money. The prosecution, in short, wishes to show that specific legislative acts were "bought." This sort of inquiry is most assuredly *not* the business of the executive branch or of the judiciary, as the Speech or Debate Clause and its glosses in *Johnson* and *Brewster* make clear. If the prosecution's case, as it appears to be, is that the introduction of bills was purchased, then, in both the accusation and prosecution of the case, it has intruded upon matters which are solely within the jurisdiction of Congress.

D. The request for a remand.

Because, unlike *Johnson,* this case comes up before trial, there is no record of actual testimony. Before instituting its appeal, however, the prosecution sought to procure pretrial determinations of proffered proofs, and the District Court Judge declined to do so (Pet. No. 78-349, 59a).[18] On August 3, 1978, after the Court of Appeals had ruled but before the petition for certiorari was filed in this Court, the government renewed its motion in the District Court and sought again to have the court make evidentiary rulings. The proceedings of August 3 are not part of the record in this case. Nevertheless, because, as we pointed out above (*supra,* p. 7), there are significant distortions in the government's brief as to what transpired on that day, we have lodged with the Clerk of the Court a copy of the transcript of the proceedings on that day.

[18] As appears from the Special Appendix filed by Mr. Helstoski, we sharply dispute whether the witnesses would even testify in accordance with the prosecution's claims, let alone whether, if they did so testify, it would be truthful.

This misstatement by the prosecution bears on its suggestion that the case be remanded to the District Court for a minute determination in advance of the trial as to the admissibility and extent of necessary redaction[19] of each letter sought to be introduced. That suggestion is absurd. Twice the District Court declined to do that, for the obvious reason that questions as to whether a particular piece of evidence does or does not indicate the performance of a legislative act or whether a particular document has been sufficiently redacted to eliminate such an indication, plainly cannot be decided in a vacuum. Admissibility must be determined in the context of the testimony and evidence adduced at trial. Moreover, a remand to the District Court for detailed pretrial evidentiary rulings would be tantamount to exercising an unprecedented supervisory mandamus to reverse the District Court's refusals to make such rulings. And dragging out this prosecution by such a procedure, including the potential for more interlocutory appeals under 18 U.S.C., §3731, is hardly consistent with minimizing interference with the legislative and the criminal processes.

E. The argument from "policy considerations".

Since the prosecution is essentially arguing that it should be permitted to prove legislative acts provided it does so indirectly rather than directly, its so-called policy arguments basically amount to a plea that this

[19] Curiously, at a proceeding on February 14, 1977, when this matter was discussed, the Assistant U.S. Attorney said, "I must tell you quite candidly the redaction in terms of this correspondence would not be feasible." C.A. App., Vol. II, 342.

Court should cooperate in an undermining of the Speech or Debate Clause. The Court is specifically asked to balance the interests of Congress against the supposed needs of the government for the sought-after evidentiary material. On the challenged premise that bribery in fact occurred, the Solicitor General asks this Court to put expediency above the Constitution.

The short answer to this argument is that the Speech or Debate Clause provides an "absolute bar" to the use of judicial power and is not subject to the balancing approach. As recently as March 20, 1979, this Court decided that "Balancing . . . is impossible" when dealing with specific constitutional prohibitions. *New Jersey* v. *Portach,* opinion per Mr. Justice Stewart, slip opinion p. 9. In any event, that balance was struck almost two centuries ago, and in terms of absolute constitutional immunity. In its most recent expression in this field, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), the Court overruled a lower court opinion which in fact had "balanced" the rights of individuals against the rights established by the Speech or Debate Clause. The Court stressed that today, as in the days of the Framers, "the prohibitions of the Speech or Debate Clause are absolute," *supra,* at 501. Repeatedly, this Court used the term "absolute" in describing rights under the Speech or Debate Clause, *id.* at 501, 503, 509. This Court made it clear that a balancing analysis was inappropriate in determining the application of the Speech or Debate Clause, *id.* at 509, n. 16.

Beyond that, the prosecution's argument in its successive points is flawed at every stage:

a) Contrary to the prosecution's argument, the evidentiary force of the Speech or Debate Clause is not "judicial creation" of an "evidentiary privilege" (Br. 68).

It is the necessary corollary to a jurisdictional limitation established by the Constitution. In *Johnson* the Court said that the judicial inquiry into the legislative acts in that case "violates the express language of the Constitution," 383 U.S. at 177. Putting in evidence, and thereby putting in issue, the whys and wherefores of legislative action is a direct questioning of legislative acts, in violation of the Speech or Debate Clause.

b) The Solicitor General views the issue as involving removal of "probative evidence . . . from the fact finder's consideration" (Br. 68). Such facts are removed only from the constitutionally inappropriate fact finder; they are completely available to the House under the Punishment Clause. And to the extent that the Article III courts have any jurisdiction of this matter, the Solicitor's argument was made and rejected in *Brewster*:

> "Perhaps the Government would make a more appealing case if it could [prove legislative acts] but here, as in [*Johnson*], evidence of acts protected by the Clause is inadmissible." 408 U.S. at 501.

c) *United States* v. *Nixon, supra,* 418 U.S. 683 (1974), cited for the application of a "balancing process" (Br. 69), is obviously inapplicable. There is no Speech or Debate Clause as to the Chief Executive. 418 U.S. at 704.

d) Neither is the issue whether "the introduction of the disputed evidence will lead to a finding of liability not on some legitimate basis" (Br. 70). The issue is whether the evidence is being admitted in the wrong tribunal, thereby threatening the separation of powers sought to be protected by the Speech or Debate Clause.

e) Admisssion of the evidence sought to be introduced, contrary to the prosecution's argument (Br. 71), would most certainly jeopardize congressional independence. It

would do so precisely because it exposes to a jury's consideration the whys and wherefores of the legislative process. Such a possibility would have an enormously inhibiting effect upon the workings of the legislature.

Finally, reference to the *Brewster* Court's dicta as to the pros and cons of legislative as opposed to judicial adjudication of cases of corruption (Br. 72) are misplaced. The Court there obviously was not referring to cases involving proof of legislative acts; those are necessarily reserved to Congress. The Court was referring to cases and controversies where legislative acts were not implicated, where clearly the courts are acting within their Article III jurisdiction.

II. Congress cannot and in fact did not delegate to the courts its punishment power under Article I, §5 of the Constitution.

For the third time in 13 years, the government presents to the Court its contention that Congress has delegated to the courts, even in respect to the performance of legislative acts, the power to try Members reserved to it under the Constitution and specifically barred to the courts by the Speech or Debate Clause.

In *Johnson* the Court did indeed reserve the issue as to whether a narrowly drawn statute could effect such a transfer of constitutional power.

In *Brewster* the government argued that 18 U.S.C. §201 was such a narrowly drawn statute and that Congress had the constitutional ability to delegate to the courts its power to probe into legislative acts. The Court left open, as it did in *Johnson*, the general question of "the constitutionality of an inquiry that probes into legislative

acts or motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute," 408 U.S. at 529, n. 18.

But in doing so, the Court strongly implied that §201 does not constitute such a narrowly drawn statute. First, language employed by the Court clearly indicates that Congress has not yet enacted a "narrowly drawn statute." The Court, being aware that §201(c) is on the books and was argued by the government, uses the following conditional phrase, "if Congress specifically authorizes such in a narrowly drawn statute," *ibid.* This can only mean that Congress has not yet done so.

Second, if the Court felt that §201(c) was such a narrowly drawn statute, it would have had to face the constitutional issue before deciding to limit the government's proof in the *Brewster* trial. If the Court were to hold that §201(c) was narrowly drawn and within the power of Congress, it would have imposed no such limitation. By necessary implication, therefore, Brewster held that §201(c) was not a constitutionally-valid vehicle for delegating Congress's limited judicial power to the Article III courts.

While the government's argument does not improve either with age or repetition, there have been important constitutional expressions since this issue was first presented in *Johnson* and *Brewster* which remove any last semblance of validity from the argument.

Mr. Justice Brennan's dissenting opinion in *Brewster* cogently analyzes this issue, 408 U.S. at 540-49, and no member of the Court indicated disagreement with the conclusion arrived at Beyond that in *United States* v. *Nixon, supra,* a unanimous Court, speaking through the Chief Justice, said:

> "[T]he 'judicial Power of the United States' vested in the federal courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed., 1938)." 418 U.S. at 705.

If Congress may not share with the judiciary its power to override a presidential veto, how can it share its power to discipline its own Members? And if the judiciary may not share with another branch its judicial power under Article III, how can Congress share *its* judicial power[20] under the Punishment Clause?

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[20] This Court has stated that:

> "Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. 1, §5, cl. 1. 'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed* v. *Delaware County*, 277 U.S. 376, 388 . . . Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the rules of law, and finally to render a

(Footnote continued on following page)

As applied to the power to punish legislators for their legislative acts, it should be noted that the Constitution not only provides for a grant of power to Congress in Article I, §5, but also includes a specific denial of power in Article I, §6, to any branch other than Congress. As this Court said in its first Speech or Debate case, "the powers confided by the Constitution to one of these departments cannot be exercised by another," *Kilbourn* v. *Thompson, supra,* 103 U.S. at 191. Assuming Congress had the power to share with other branches of the government some of the powers granted to it, that hardly means it can also share with others, powers absolutely prohibited to such other branches. To argue then, as does the prosecution, that Congress may enlist the aid of the courts in areas not prohibited to the judiciary *e.g., Burton* v. *United States,* 202 U.S. 344 (1906) (Br. 78), or 2 U.S.C., §192 (Br. 79, n. 33), is plainly irrelevant. What the prosecution is arguing here is that Congress has the power to nullify a specific command of the Constitution prohibiting any other branch from questioning a Member of Congress with respect to legislative acts.

The Speech or Debate Clause is, as this Court explained, a fundamental reenforcing mechanism of the separation of powers, *Johnson,* 383 U.S. at 178. Without that Clause,

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(Footnote continued from preceding page)

> judgment which is beyond the authority of any other tribunal to review.' *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, 613 (1929)."

While a footnote in the Court's opinion in *Powell* v. *McCormack, supra,* 395 U.S. at 519, n. 40, limits the impact of the last phrase in the foregoing statement, it certainly does not alter the proper characterization of the congressional powers under Article I, §5, Cl. 1, as being judicial. Plainly the powers under Article I, §5, Cl. 2 fall in the same category.

"all other privileges would be comparatively unimportant or ineffectual," *Storey on the Constitution,* quoted in *Kilbourn* v. *Thompson,* 103 U.S. at 204.

Congress simply has no power to change our form of government; Congress has no power to minimize the independence of the legislature in the scheme of our society; Congress has no power to give to the executive a pressure point on its Members which in a subtle but decisive manner will alter the relationship of forces in the tripartite scheme of government fixed by our Constitution.

We think the matter was settled by *Coffin* v. *Coffin,* 4 Mass. 1 (1808), which this Court referred to as "perhaps the most authoritative case in this country" on the Speech or Debate Clause. *Kilbourn* v. *Thompson,* 103 U.S. at 204. *Coffin* was indeed decided by judges who were contemporary with the formation of the Constitution, and their construction is not merely entitled to great weight, "it is almost conclusive." *Burrow-Giles Lithographic Co.* v. *Saxony,* 111 U.S. 53, 57 (1884).

Said the court in *Coffin, supra*:

> "[A legislator] does not hold this privilege at the pleasure of the House; but derives it from the will of the people, expressed in the Constitution, which is paramount to the will of either or both branches of the legislature . . . of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the House, or by an act of legislature." 4 Mass. at 27.

Clearly, *Coffin* is as much an aspect of the legislative history of §201 as is the utter failure of the debates relating to the 1853 statute to address the Speech or Debate Clause. This, we submit, completely disposes of any contention that Congress intended (if it had the power) to

delegate to the courts a power to discipline Members of Congress with respect to their legislative acts. Moreover, if broad constitutional determinations are to be inferred from a nearly blank legislative history, a comparison of §201 to its predecessor, is probative.

In 1853, Congress first provided for the criminal prosecution of Members of Congress. That legislation was substantially unchanged until October of 1962.[21]

In 1962, when Congress effected a general revision of the conflict of interest laws, it adopted §201, the legislation which governs this case. That statute makes a significant change in the language describing the kind of conduct which is encompassed within its reach. The word "vote" has been deleted. It is not included within the definition of "official act," 18 U.S.C., §201(a).

This deletion could hardly have been accidental. "Vote" is the only statutory word which, as applied to a legislator, may implicate a legislative act. Its excision in 1962 indicated that Congress wanted to eliminate any suggestion that it intended to yield to the courts its power to prosecute legislators for their legislative acts.

The prosecution has incorporated by reference the government's brief before this Court in *Brewster* (Br. 29)

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[21] The statute in the form in which it existed prior to 1962 defined the crime as follows:

> "Whoever, being elected or appointed a Member of or Delegate to Congress, . . . shall, . . . ask, accept, receive, or agree to receive, any money, . . . for his attention to, or services, or with the intent to have his action, *vote,* or decision influenced, on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, . . ." §110 of the Criminal Code. Act of March 4, 1909, c. 321 Stat. 1088, 1108 (emphasis supplied).

and has used its current brief to reply to some of the points in the brief for appellee in *Brewster* (Br. 86). To avoid further burdening the Court, we believe it appropriate that we incorporate by reference pp. 49-83 of appellee's brief in *Brewster* for further elucidation of the issues herein and we rely exclusively on that brief in respect to a discussion of whether §201 is a "narrowly drawn" statute. We would simply add that *United States* v. *Dowdy,* 479 F. 2d 213 (4th Cir., 1973), a post-*Brewster* decision, specifically held that §201 was not such a statute.

III. The Speech or Debate Clause creates rights and relationships which are not waivable and, if they were, any waiver must be express.

The short answer to the waiver argument is that the Speech or Debate Clause establishes a jurisdictional limitation upon Article III courts and no waiver can effect a shift in jurisdiction. See our opening brief, pp. 64-65.

Since the Solicitor General refuses to acknowledge the jurisdictional impact of the Speech or Debate Clause, he simply does not respond to this issue, which in our view is dispositive.

We shall nevertheless respond to the Solicitor's argument on its own terms.

Throughout its brief, the prosecution argues in derogation of the vitality of the Speech or Debate Clause. It argues that it can prove legislative acts if it is not trying them; if not that, it argues that it can introduce legislative acts depending on the form of proof; if not that, it argues that the Speech or Debate Clause protection of Members of Congress has been abandoned in any §201 prosecution; and if not that, it finally argues that in this case, the Speech or

Debate Clause does not apply because its protections have been waived by Mr. Helstoski in testifying before the grand jury. The waiver argument is presented here as a sort of last gasp[22] in a brief wherein the government never acknowledges the real power of the Clause to protect Members of Congress against the sort of prosecution envisaged here.

The prosecution's argument as to waiver has two points:

a) that the Clause functions for the benefit of the individual Member of Congress and only for his personal benefit and he may waive its protections, and

b) that such a waiver may be accomplished by something less than a clear and express disavowal of its protection. We respond to these arguments as follows:

A. The Speech or Debate Clause creates an institutional as well as a personal protection.

Whether or not one considers the protection of the Clause personally waivable by a Member of Congress, it is beyond argument that the Clause was not designed to

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[22] We note that the government had another string to its bow in the lower court where it argued that even aside from a grand jury proceeding, *any* public, non-Congressional dissemination of information regarding legislative acts constituted a waiver. See our opening brief, p. 69. The District Court pointed out that such a view of the Speech or Debate Clause was inconsistent with "the political realities of our democratic system" (Pet. No. 78-349, 56a).

The government now dismisses this as "some imprecision in the government's argument below" (Br. 118) from which it quickly retreats. There was nothing imprecise about the government's argument below; indeed, it was straightforward. This exercise by the prosecution merely demonstrates its determination to undercut the Speech or Debate Clause one way or the other.

protect the individual Member alone but rather to protect him *and* Congress, thereby implementing the separation of powers. It is therefore inappropriate to consider whether the Clause is waivable without assessing the impact of waivability on Congress. Likewise, if waiver is possible, the circumstances under which it may occur must rest upon considerations of its effect upon congressional independence.

But, in his arguments on waiver, the Solicitor General chooses to regard the Clause as no more than an evidentiary privilege, overlooking its fundamental structural importance in maintaining the separation of powers. Thus, the prosecution says that "unless there is something unusual about the Speech or Debate Clause that requires adherence to an especially high standard" (Br. 111), Mr. Helstoski should be held to have waived the protection of the Clause by virtue of testifying and producing documents before a grand jury.

Of course there is "something unusual" about the Speech or Debate Clause: It is the mechanism by which the independence of Congress, in our separation of powers system, is preserved from the encroachment of other branches. As such, its primary function is clearly institutional.

The Solicitor's argument that waiver of the Speech or Debate Clause is possible rests upon the view that the Clause creates *only* a personal privilege and that Congress has no interest in the matter. The Solicitor claims this is the "prevailing view" of the Clause and cites (Br. 115), as comprising this view, an overruled case (*United States* v. *Craig,* 528 F.2d 773 (7 Cir. 1976)); an ambiguous footnote (*Gravel* v. *United States,* 408 U.S. 606, at 622 n. 13); and a misconstrued precedent (*Coffin* v. *Coffin,* 4 Mass. 1 (1808), all of which were dealt with in our opening brief, at pp. 63-67. It now adds to its composition of the "prevailing view" of the personal nature of the Speech or Debate Clause two citations indicating merely that the privilege created by the Clause may be invoked by an individual Member when necessary and is not defeasible by Congress (Justice Brennan's dissent in *Brewster,* 408 U.S. at 547, and *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3 Cir. 1977)), and one citation, *Powell* v. *McCormack,* 395 U.S. 486, 505, whose import remains mysterious to us.

These citations, introduced initially to show that the Clause creates only a personal privilege, are then transmogrified immediately to "a widespread assumption that a Congressman can waive his Speech or Debate privilege" (Br. 116). Weak enough when serving to support a "prevailing view" that the privilege is personal, the six citations are now taxed with carrying the weight of a "widespread assumption" that the privilege is waivable; they are unequal to that burden. Clearly, to say that a privilege is personal in the sense of *Coffin, supra,* merely means that it may even be asserted over the objection of the House. There is a great difference between that position and the argument that the privilege may be waived without approval of the House.

In fact, in arguing that the Clause may be waived, the Solicitor General does not cite the most immediately relevant precedent, *Johnson.* In that case, the Congressman's speech on the floor of the House was introduced by the government in its case-in-chief *without objection by Representative Johnson* (Gov. Br. in *Johnson,* p. 5, n. 2). Moreover, Johnson later introduced the speech in his own defense. There, too, the government argued something akin to waiver, for this Court summarized the government's argument as including the following: "The govern-

ment contends that the Speech or Debate Clause was not violated because . . . the defendant . . . introduced the speech," 383 U.S. at 184. The Court quickly dismissed this argument, emphasizing what we have said here, namely, that such a waiver contention cannot prevail in a case involving the Speech or Debate Clause. Nowhere in the opinion of this Court is there any indication that Johnson thereby waived his right to assert later that his prosecution had, on that account, violated the Speech or Debate Clause. The case at bar is even stronger than *Johnson* because here, any arguable waiver occurred in a forum other than the trial court.

The government, in response to our waiver point, seems unable to accept the plain fact that the Speech or Debate Clause serves to protect Congress *and* its Members and, for that reason, may be asserted by Members of Congress when they perceive they are, by virtue of their offices, in jeopardy and that it need not be asserted when they are not is such jeopardy. Thus, the government asks, is it possible that a Member can use his legislative acts in his own defense but object and raise the privilege when the government seeks to use his acts against him? Can this be what the Framers intended? To this we must reply, in both cases, in the affirmative. A Member may defend himself with his own acts and repudiate the use of his acts against him, precisely because the former does not constitute "questioning" of those acts, while the latter does.

Indeed, the prosecution, in its own fashion, recognizes this when it says that:

> "[I]f a Member of Congress himself decides to place evidence of his legislative acts before the jury, it is difficult to see how admission of that evidence could jeopardize the congressional independence guaranteed by the Speech or Debate Clause." (Br. 113-114)

We agree, assuming that the Member's acts are not being "questioned." Where, however, as here, the Member learns only later that it is *his* acts that are the target of grand jury scrutiny, it can hardly be said that by producing evidence of his acts he has waived his objections to the "questioning" of those acts or that, in view of the institutional interests of the Speech or Debate Clause, he had the power to submit to being "questioned" about his acts by the grand jury. See Jefferson's *Manual,* referred to at pp. 65-66 of our main brief.

B. Waiver, if possible, must be express.

The prosecution appears to believe that there is no justification for the standard which the courts below held a waiver of the Speech or Debate protection would require, were such waiver possible. That standard is no more than a finding that one entitled to the protection of the Speech or Debate Clause, cannot be held to have waived his rights absent express waiver. Assuming that waiver is possible, the deference due Congress by the courts would seem to mandate no less. It is in keeping with the prosecution's naive questioning whether there is "something unusual" about the Speech or Debate Clause that it finds such a standard "extraordinary" (Br. 117).

There was no such express waiver by the Member in this case. The mere fact that he chose not to invoke the Fifth Amendment when he was given the standard warnings regarding the privilege against self-incrimination can by no means be interpreted as a waiver of the Speech or Debate Clause.

The prosecution's objection to the express waiver standard rests on the hypothetical case of "a Senator or Representative [who] know[s] the purpose of a particular investigation and deliberately fails to claim the privilege" (Br. 119). Apparently, the prosecution here means that a Member who knows the purpose of the investigation is to target him, but nevertheless fails to claim the privilege, would not be deemed to have waived it.

This argument falls of its own weight. How could the Member know he is a target? It can only be if the Member is told so by the United States Attorney. Surely it poses no great problem for the United States Attorney to follow up that statement with a query as to whether the target waives the protection of the Speech or Debate Clause. Similar scenarios, focusing on the Fifth Amendment privilege against self-incrimination, take place every day.

C. Policy considerations against waiver.

It is the absolute and impenetrable nature of the Speech or Debate Clause which protects Congress. If that barrier be breached by one, it will be breached by many and will serve no function. Thus, in addition to the explicit support for non-waivability found in the history of the Clause, which we point out in our opening brief at pp. 65-66, contemporary reasons exist to explain the continued necessity for that policy.

The practical consequences of accepting the government's waiver argument would be to diminish congressional independence. Let it once be known that a Member of Congress can waive the protection of the Speech or Debate Clause and any failure to waive in the course of a grand jury investigation or at trial will immediately be taken

as proof of the Member's guilt. In much the same way that a failure to waive the self-incrimination protection of the Fifth Amendment is regrettably seen by the public as an admission of guilt, so will a failure to waive the Speech or Debate Clause be taken as an admission of corruption. And the Solicitor General has already laid the foundation for this by suggesting that the privilege against self-incrimination and the Speech or Debate Clause are analogous (Br. 15).

Thus, legislators will be caught in the web of executive action—exactly what the Speech or Debate Clause was designed to prevent.

Statements by the Solicitor General that Members of Congress will not be fearful of one or another intrusion into their Speech or Debate privilege and will not be inhibited in their work (Br. 71) are hardly convincing. Persons with considerably more experience with the legislative process have expressed quite clearly the impact upon legislators of a breach of the Speech or Debate Clause.[23]

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23 "I have spent about six years serving in the legislature of North Carolina. And altogether I have served almost 19 years in the Congress in one House or the other, and I have to testify to this Court that among the most timid creatures I have ever seen are legislators. They can cope, in a sense, with isolated criticisms of their constituents who have a right under the Constitution, incidentally, to criticize them, and they can cope with criticism from the press, which has a right to criticize their conduct. But I don't know anything that would come nearer scaring a poor Senator or poor Representative to death than to have either the executive branch of the government with all of the might, governmental might, which the executive branch possesses, or the ju-

(Footnote continued on following page)

CONCLUSION

For the foregoing reasons, in No. 78-546 the judgment of the court below should be vacated and the cause remanded with instructions to dismiss Counts I through IV of the indictment. Failing that, in No. 78-349 the judgment of the Court of Appeals should be affirmed.

Dated: Newark, New Jersey
March 22, 1979.

Respectfully submitted,

MORTON STAVIS
Attorney for Henry Helstoski

On the Brief:

LOUISE HALPER

(Footnote continued from preceding page)

dicial branch of the government with all the respect which the judicial branch enjoys as an impartial body . . . to have the power to pass officially in any way on their conduct as a legislator. That would absolutely destroy the independence of the legislative body . . ." Senator Ervin's oral argument before this Court in *Gravel*, pp. 7-8.